

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFERY STEPHEN JONES,

Defendant-Appellant.

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UNPUBLISHED

June 18, 1999

No. 207476

Eaton Circuit Court

LC No. 97-020109 FH

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of arson of a dwelling house, MCL 750.72; MSA 28.267. He was sentenced to five years of probation with the first 180 days in jail, plus \$87,904.95 in restitution, \$400 in costs, \$60 to the crime victim's rights fund and one hundred hours of community service. He appeals as of right, and we affirm.

Defendant claims that the trial court did not properly instruct the jurors with regard to unanimity. We disagree.

The trial court gave the jury two general unanimity instructions. During the initial charge to the jury at the beginning of trial, the trial court repeated the standard jury instruction, CJI2d 2.25, verbatim: "A verdict must be unanimous. That means that every juror must agree on it and it must reflect the individual decision of each juror." The second time, during the final charge to the jury, the given instruction was substantially similar to the standard instruction: "A verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agrees on the verdict." Defendant argues that the jury should have been given a more specific instruction. Defendant was only charged with one count of arson of a dwelling house, but evidence of two fires was presented to the jury. Defendant claims that the jury should have been instructed that they had to unanimously agree as to which fire, if either, constituted arson of a dwelling house. Defendant did not request a specific

unanimity jury instruction, and he also failed to object to the jury instructions as given. Where a defendant fails to object to a jury instruction, appellate review is waived absent manifest injustice. *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995). In this case, we find no manifest injustice.

This Court has indicated that when a prosecutor offers evidence that a defendant committed two or more criminal acts, but *charges* him with only one offense, the trial court should instruct the jurors that they all have to agree on which of those multiple acts constituted the actus reus of the single charged offense. See, e.g., *People v Quinn*, 219 Mich App 571, 576; 557 NW2d 151 (1996); *People v Yarger*, 193 Mich App 532, 536-537; 485 NW2d 119 (1992). This rule is not absolute. See *People v Cooks* 446 Mich 503, 512-513; 521 NW2d 275 (1994).

In this case, we are not confronted with a "multiple acts" situation that would require a more specific unanimity instruction. Even though there was evidence of two separate fires, the evidence did not provide two separate sets of facts, either of which could have provided the actus reus for the single count of arson of a dwelling house as charged. Witness testimony supported that the first fire only caused minor smoke damage and did not burn the house. As a result, the first fire could not have served as an actus reus for arson of a dwelling house. See CJI2d 31.2(2) (arson of a dwelling house requires the structure to be burned, and property is not burned if it is merely blackened by smoke and not charred so that any part of it is destroyed). Moreover, we note that the trial court properly instructed the jurors that to find defendant guilty of arson of a dwelling they had to find that the prosecutor proved beyond a reasonable doubt that defendant burned part of the house, and burning does not include mere smoke damage.<sup>1</sup>

We also conclude that because the evidence of the two separate fires did not lead to juror confusion, the general unanimity instructions were sufficient. *Cooks, supra* at 524. A reasonable juror would have inferred that the second fire, not the first fire, was the basis for the charged offense. The five testifying experts rendered opinions regarding arson as the cause of the second fire. Also, the prosecutor's closing argument focused on the second fire as being the one subject to the charge, and although the first fire was discussed as being intentionally set by defendant, there was no argument that the first fire would support the arson charge alone. The prosecutor basically used the evidence of the first fire to argue that defendant had a "plan" or intent to burn the house, which plan was accomplished by the second fire. Furthermore, we note that the jurors in this case did not express confusion about their decision-making duties. There is no basis to conclude that the jury was confused about the basis of defendant's guilt.

Affirmed.

/s/ Janet T. Neff  
/s/ Harold Hood  
/s/ William B. Murphy

<sup>1</sup> We note that even if both fires could have provided the actus reas for arson of a dwelling house, a unanimity instruction was not necessary in this case. "[W]here materially identical evidence is presented

with respect to each act [each fire], and there is no juror confusion, a general unanimity instruction will suffice." *Cooks, supra* at 512-513.